IN THE

Supreme Court of the United States

Number 75-1574

JOHN G. DEFRANCES, JR.

Petitioner

versus

THE CITY OF BOSSIER CITY

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case also involves the following statutes and ordinances:

1. Louisiana Revised Statutes 33:4785:

   Any municipality may suspend or revoke within the corporate limits and any police jury or other governing authority of the parish may suspend or revoke within the limits of the parish permits issued to retail dealers in beverages having an alcoholic content of more than 6% by volume for causes set forth in R.S. 26:88, 26:89; and may suspend or revoke permits issued to such retail dealers in beverages having an alcoholic content of not more than 6% by volume for causes set forth in R.S. 26:285, 26:286.

2. Code of Ordinances, City of Bossier City Section 5-30(7):

"Any alcoholic beverage permit may be suspended or revoked for any of the following causes:

. . .

(7) If any dealer or any person listed in subsection B of section 26:79, Louisiana Revised Statutes, violates or has violated any provision of this chapter. . . ."

3. Code of Ordinances, City of Bossier City Section 5-31:

"(a) Before any alcoholic beverage permit is suspended or revoked, the holder thereof shall be entitled to a hearing, and no such permit shall be suspended or revoked unless such a hearing has been held, and the majority of the city council thereafter votes for such suspension or revocation.

(b) A notice shall be served upon the holder of the permit stating the time and place of the hearing to be held by the city council, which shall be not less than ten (10) calendar days from the date such notice is given. The notice shall enumerate the cause or causes for suspending or revoking the permit and shall be sent by registered mail to the holder of the permit at the address of his place of business, as given in his application for the permit; or it may be served on him in person by an officer or employee of the city.

(c) The holder of an alcoholic beverage permit who is aggrieved by a decision of the city council to suspend or revoke his permit may, within ten (10) days of the notification of the decision, take a devolutive appeal to the district court having jurisdiction over his place of business, and on such appeal, the trial shall be *de novo*. Within ten (10) calendar days from the signing of the judgment by the district court, the city or the holder of the permit, as the case may be, may devolutively appeal

from the judgment of the district court to the Court of Appeals as in ordinary civil cases."

4. Louisiana Revised Statutes 33:4788:

"The holder of the permit who is aggrieved by a decision of the governing body of the municipality or parish to suspend or revoke his permit, may within ten (10) days of the notification of the decision take a devolutive appeal to the district court having jurisdiction of his place of business and on such appeal the trial shall be *de novo*. Within ten (10) calendar days from the signing of the judgment by the district court the municipality or parish governing authority or the holder of the permit, as the case may be, may devolutively appeal from the judgment of the district court to the Court of Appeal as in ordinary civil cases."

REASONS FOR DENYING THE WRIT

The matter in question originated at an *administrative* hearing before the City Council of the City of Bossier City, Louisiana. In this hearing, the City Council was acting in an administrative function, i.e. determining whether or not the liquor licenses in question should be revoked or suspended.

The City Attorney properly acted as legal advisor for the City Council concerning any legal questions they might have during the course of this hearing. The Assistant City Attorney properly presented evidence to the City Council which was acting as the administrative hearing body.

Any determination by the City Council convened under the authority of Chapter 5, Section 5-31 of the Code of Ordinances, City of Bossier City, Louisiana is a purely administrative decision and appeal to the State District Court in a trial *de novo* is provided for therein.

Chapter 5, Section 5-30, entitled "Suspension or revocation—Grounds" provides:

> "Any alcoholic beverage permit may be suspended or revoked for any of the following causes:
>
> . . .
>
> (7) If any dealer or any person listed in subsection B of Section 26:79, Louisiana Revised Statutes, violates or has violated any provision of this Chapter."

Chapter 5, Section 5-7 of the Code of Ordinances, City of Bossier City, Louisiana, entitled "Prohibited acts on retail sales premises generally", provides that:

> "No person holding a retail dealer's permit under this chapter and no alcoholic beverage handling employee shall do or permit to be done any of the following acts on or about the premises covered by such permit:
>
> . . .
>
> (7) Employ or permit females, commonly known as "B girls" to frequent the premises and solicit patrons for drinks or to accept drinks from patrons and receive therefor any commission or any renumeration in any other way."

The City Council determined that John DeFrances had violated the provisions of Chapter 5 of the Code of Ordinances, City of Bossier City, Louisiana and ordered the suspension of his licenses.

Mr. DeFrances appealed this decision in accordance with the provisions of Chapter 5, Section 5-31, Code of Ordinances, City of Bossier City, Louisiana, and the matter was tried in the Twenty-Sixth Judicial District Court in a trial *de novo*.

Mr. DeFrances was afforded due process in the administrative hearing before the City Council of Bossier City, Louisiana and the subsequent proceedings in the Louisiana court system.

There is no merit to the petitioner's contention that he was denied procedural due process inasmuch as one member of the City's office presented evidence at the administrative hearing while another member of the City's legal staff acted as legal advisor to the City Council during the hearing. See *Duke vs. North Texas State University*, 469 F. 2d 829 (5th Cir. 1973). See also 73 C.J.S. Public Administrative Bodies and Procedure, Sec. 135 at page 461:

> "The fact that the hearing officer or the agency of which he is an officer or member also acts as investigator, prosecutor, witness, and judge or fact finder does not render the hearing unfair . . ."

Even assuming *arguendo* that there was some defect in procedural due process, such defect was clearly cured when the petitioner sought and obtained a trial *de novo* in the State District Court before the State District Judge.

It should be noted that Section 5-30 sets forth grounds for suspension or revocation of a permit or permits held by a person or dealer and does not limit the revocation or suspension to the permit for the premises on which the offense occurred. It is the intent of this statute to suspend or revoke the permit of a permitee for misconduct as set forth in Chapter 5 of the Code of Ordinances, City of Bossier City, Louisiana, regardless of where the misconduct occurs or how many permits that person may hold.

It is to be further noted that Section 5-30 applies to *all* permit holders regardless of sex, color, creed, religion or national origin.

The central issue of this case is the police power of the State or one of its political subdivisions to regulate the sale and consumption of alcoholic beverages. Clearly, the City was exercising this constitutionally delegated authority, specifically with

regard to enforcing the ordinances prohibiting "B-drinking". The Bossier City Ordinance in question provides:

> "Section 5-7 Prohibitive Acts on Retail Sales Premises: Generally:
>
> *No person* holding a retail person's permit under this chapter and no alcoholic beverage handling employee shall do or permit to be done any of the following acts on or about the premises covered by such permit . . .
>
> (7) *employ or permit* females, commonly known as "B-Girls" to frequent the premises and solicit patrons for drinks, or to accept drinks from patrons and receive therefor any commission or renumeration in any other way." (emphasis supplied)

In spite of the assertions by petitioner that consumption is not *per se* unhealthy or immoral, regardless of the place, people, and circumstances surrounding it, such activity is nonetheless a proper subject for the exercise of police power regulation. The need for regulation is well expressed in 45 AM JUR 2nd, Intoxicating Liquors, Section 23, which states:

> "Although intoxicating liquors and traffic therein, where permitted or tolerated, are lawful as any other property or business and as fully entitled to protection, if the liquor traffic is admittedly dangerous to public health, safety, and moral, and is therefore essentially within, and its regulational prohibition is fully justified under, police power."

The petitioner asserts that this ordinance discriminates against females. It is simply an act by which the City of Bossier City exercises its police power to control and regulate the alcoholic beverage industry, and as recently as 1972 in the case of *California vs. LaRue*, 409 US 109, 114-115, 118-119, 93 S. Ct. 390, 34L. Ed. 2d 342, the Supreme Court has reaffirmed broad powers of the State to regulate the traffic in liquor under

the 21st amendment. Also, see *Goesaert vs. Cleary*, 69 S. Ct. 198 (1948).

It should be noted that the ordinance in question is not directed against females alone, but is directed against *any person* regardless of sex who permits or employs females commonly known as "B-girls", etc.

It is well known that the test used to determine the validity of a state statute or city ordinance under attack on the grounds of denial of equal protection to a certain statutory class or classification is the requirement that the statutory classification bears some rational relationship to a legitimate state purpose.

However, the petitioner argues that an equal protection question involving classification based upon sex is inherently suspect and, therefore, is subject to the test of strict judicial scrutiny by the court. In support of this argument, the petitioner cites the case of *Frontiero vs. Richardson*, 93 S. Ct., 1764 (1973). It should be noted that *Frontiero* is not conclusive authority for the contention that a classification based on sex is subject to strict judicial scrutiny for the obvious reason that only three Justices of the Supreme Court concurred in using this test. Further, it is important to note that the concurring opinion of Mr. Justice Powell, joined by Chief Justice Burger and Mr. Justice Blackmun indicated that it was unnecessary for the court to characterize sex as a suspect classification at that time.

In further support of respondent's contention that the

strict judicial scrutiny test is not automatically available in questions of equal protection based on the classification of sex, we refer this Honorable Court to the case of *White vs. Fleming*, 522 F. 2nd 730 (7th Cir. 1975). In *White*, the Court of Appeals reviewed the test used in the Federal Courts when considering alleged denial of equal protection based on classification by sex. Clearly, the *White* court concludes that there has been no ultimate decision that sex is an inherently suspect classification.

Therefore, since it is not conclusive that the strict judicial scrutiny test is to be used when sex is the classification under the equal protection clause of the 14th Amendment, then the City of Bossier City does not have to meet the "compelling interest" test required when a classification is inherently suspect. The test to be used is the rational basis test. Respondent submits that the record below reveals that this latter test has been met.

Counsel for petitioner seems to have difficulty in understanding exactly who it is that the statute is attempting to protect. Petitioner submits that the statute is not designed to protect the public in general because they are not even on the premises. This is inconsistent with the fact that petitioner's business is open to the public and does rely on public patronage. Because of the public patronage, it is within reason for the City to enact ordinances to protect the public in general against the practice of allowing or permitting "B-Drinking" and "B-Girls".

Obviously, there are many reasons why the City enacted ordinances to prohibit the solicitation of drinks by females for renumeration in order to protect the public health and morals.

Those reasons are summarized in 99 ALR 2d 1218 (Section 2) which states:

> . . . To eliminate the employment of "B-Girls", a practice said to have done more to bring criticism upon the liquor industry than anything else. *United States vs. R. & J. Enterprises* (1959, D.C. Alaska) 178 F. Sup. 1.
>
> . . . To avoid a purposeful and commercial exploitation of the customer. *Greenblatt vs. Martin* (1962) 177 Cal App 2d 738, 2 Cal Rptr 508.
>
> . . . Not to prevent harm to Bar Girls from imbibing hard liquor or even drinking soft liquid instead of anticipated stronger substances, but rather to avoid a danger to the public that bars might be converted into places for solicitations of customers to purchase drinks for others, the court noting that this was a system which converts the proper use of the bar as a place of social and relaxed drinking into a purposeful and commercial exploitation of the customer, and saying that by the statute the legislature had protected the customer's right to access to his drink without exposure to entrapment by females who urge the purchase of orange juice at exorbitant prices, and without subjection to a systematized commercial exploitation of the unwary. *Greenblatt vs. Martin* (1962) 177 Cal App 2d 738, 2 Cal Rptr 508.
>
> . . . to prevent such evils resulting from solicitation of the purchase of drinks as encouraging customers to spend and drink more than they otherwise would, charging customers for alcoholic beverages when actually nonalcoholic beverages are served, and the happening of other immoral transactions which tend to find their beginning from such solicitations. *Miami vs. Kayfetz* (1957, Fla) 92 So 2d 798.
>
> . . . to curtail personal contact between female performers and the patrons of nightclubs which serve intoxi-

cating liquors and furnish striptease or burlesque entertainment, by prohibiting these performers from associating or mingling with such patrons in the establishments. *New Orleans vs. Kiefer* (1964) 246 La 305, 164 So 2d 336.

Despite the aforementioned reasons, the petitioner would have one believe that no mature male needs legislative protection from the so-called weaker sex; even though at the time of this writing, the Congress of the United States is considering legislation to protect public funds, if not public morals, as a result of congressional employment of females. Respondent submits that if the activity of women give rise to moral and social problems for which the Congress, in its judgment, should devise deterrents; the state or municipality is not precluded . . . "from drawing a sharp line between the sexes, certainly, in such matters as the regulation of the liquor traffic." *Goesaert vs. Cleary*, 69 S. Ct. 198 (1948).

The City Ordinance of Bossier City does not violate the equal protection clause of the 14th amendment since the classification in this case is a natural and reasonable one. Except for the allegations stated in applicant's writ, the petitioner has not shown that this ordinance is irrational and unreasonable in that it does not protect public health and morals. Specious argument is not sufficient support for the petitioner's contention that the ordinance is irrational and unreasonable.

As stated earlier, this Honorable Court has not stated conclusively that the classification based on sex is inheritently suspect and, therefore, is subjected to the strictest test of judicial scrutiny. Therefore, it is submitted that the test to be used to determine if a classification based on sex is a denial of equal protection is the rational basis test and that under this test the Bossier City Ordinance is constitutional.

CONCLUSION

There has been no deprivation of the petitioner's constitutionally protected rights. Therefore, the application for writ should be denied.

Respectfully submitted,

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By: 
GRAHAM W. ROGERS

STATE OF LOUISIANA
PARISH OF BOSSIER

BEFORE ME, the undersigned authority, personally came and appeared, GRAHAM W. ROGERS, who after first being duly sworn did depose that:

A copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Louisiana, has this day been mailed to John G. DeFrances, Jr., through his attorneys:

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and

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postage prepaid, on this the 7th day of July, 1976.

GRAHAM W. ROGERS

SWORN TO AND SUBSCRIBED before me this 7th day of July 1976.

NOTARY PUBLIC